Supreme Court, U.S.
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No. 041257

In The

Supreme Court of the United States

FRANCES D. KETTENBACH,

Petitioner,

v.

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS AND NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE J. DEMOULAS, ARTHUR S. DEMOULAS AND EVANTHEA DEMOULAS,

Respondents.

On Petition For A Writ Of Certiorari To The Appeals Court For The Commonwealth Of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Code of Judicial Conduct adopted by the Supreme Judicial Court of Massachusetts provides, in part: "Disqualification (1) A judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) the judge has personal bias or prejudice concerning a party or a party's lawyer. . . . " Supreme Judicial Court Rule 3:09, Canon 3(E)(1)(a), 440 Mass. 1319-1320 (2003). See American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), p. 224, containing the same language. Decisions of the Supreme Judicial Court, building upon a court rule nearly identical to the present Canon 3, have laid down the following two-part recusal procedure for Massachusetts trial judges:

> "Faced . . . with a question of his capacity to rule fairly, the judge [must] consult first his own emotions and conscience. If he passed the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was 'a proceeding in which his impartiality might reasonably be questioned.' S.J.C. Rule 3:25, Canon (3)(C)(1)(a), 359 Mass. 841 (1972)."

Lena v. *Commonwealth*, 369 Mass. 571, 575, 340 N.E. 2d 884, 886-887 (1976). See *Haddad* v. *Gonzales*, 410 Mass. 855, 862, 576 N.E. 2d 658, 662-663 (1991). The appellate courts of Massachusetts review such determinations under the deferential "abuse of discretion" standard. *Haddad* v. *Gonzales*, 410 Mass. at 862, 340 N.E. 2d at 662.

QUESTION PRESENTED – Continued

Two questions are presented:

1. Whether the two-part self-analysis mandated by the Supreme Judicial Court of Massachusetts, which permits a trial judge, sitting in judgment of her own conduct, to determine whether to disqualify herself in a proceeding where her impartiality might reasonably be questioned, violates the right of litigants in State courts to a fair trial by a fair tribunal, as secured to them by the Fourteenth Amendment to the United States Constitution.

2. Whether the bias and prejudice manifested by the trial judge in this case were so pronounced as to violate the petitioner's right to a fair trial by a fair tribunal, as secured to her by the Fourteenth Amendment to the United States Constitution and, therefore, required that the defendants' motions for relief from judgment be allowed.

LIST OF PARTIES

This petition involves two cases which were consolidated for consideration by the Massachusetts Appeals Court. The two cases and the parties in each are listed below.

(a) Rafaele Loraine Demoulas, administratrix, & others, Plaintiffs-Appellees *vs.* Telemachus A. Demoulas & others, Defendants-Appellants, Massachusetts Appeals Court Docket No. 2003-P-1255:

Plaintiffs-Appellees

Rafaele Loraine Demoulas, administratrix of the Estate of Evan G. Demoulas and next friend of Vanessa Evan Demoulas;

Diana D. Merriam;

Fotene J. Demoulas;

Arthur S. Demoulas;

Evanthea Demoulas.

Defendants-Appellants

Telemachus A. Demoulas;

Arthur T. Demoulas;

Frances D. Kettenbach;

Glorianne D. Farnham;

Caren D. Pasquale;

Demoulas Super Markets, Inc.

LIST OF PARTIES – Continued

(b) Arthur S. Demoulas, Plaintiff-Appellee, *vs.* Demoulas Super Markets, Inc., & others, Defendants-Appellants, Massachusetts Appeals Court Docket No. 2003-P-1256 (consolidated with No. 2003-P-1255):

Plaintiff-Appellee

Arthur S. Demoulas

Defendants-Appellants

Demoulas Super Markets, Inc.;

Valley Properties, Inc.;

Market Basket, Inc.;

Doric Development Corp.;

Lee Drug, Inc.; and

Telemachus A. Demoulas,

Irene Demoulas,

Arthur T. Demoulas,

Frances D. Kettenbach,

Glorianne D. Farnham, and

Caren D. Pasquale, individually and as they are general partners of 231 Realty Associates.

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OPINION BELOW

The Massachusetts Appeals Court considered these two consolidated cases in an unpublished dispositive order issued October 26, 2004. See Appendix A, p. App. 1. The Appeals Court's brief order, which affirmed the denial of the defendants-appellants' emergency motions for relief from judgment, stated that the Court was acting for substantially the reasons set forth in the decision of the judge of the Superior Court (hereinafter, motion judge) dated July 3, 2003 (see Appendix B, p. App. 3), as well as on grounds urged in the appellees' brief, pp. 24-29 (challenging the timeliness of the defendants' motions) and 39-43 (asserting the preclusive effect of the law-of-the-case doctrine) (see Appendix F, p. App. 18).

STATEMENT OF JURISDICTION

The petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257. An order of the Massachusetts Supreme Judicial Court denying the petitioner's application for further appellate review (discretionary review) was entered December 23, 2004. See Appendix C, p. App. 5.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. 14, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(a) The fifteen-year struggle for control of a family-held corporation

The proceedings in this protracted litigation are set forth extensively in *Demoulas* v. *Demoulas Super Mkts., Inc.*, 424 Mass. 501, 677 N.E. 2d 159 (1997) (*Demoulas I*); *Demoulas* v. *Demoulas Super Mkts., Inc.*, 428 Mass. 543, 703 N.E. 2d 1141 (1998) (*Demoulas II*); *Demoulas* v. *Demoulas*, 428 Mass. 555, 703 N.E. 2d 1149 (1998) (*Demoulas III*); and *Demoulas* v. *Demoulas*, 432 Mass. 43, 732 N.E. 2d 875 (2000) (*Demoulas IV*). The background of the cases is summarized below.

In 1990, two civil actions were commenced in Massachusetts' highest trial court, launching a contest for control of a family-held corporation, Demoulas Super Markets, Inc. (DSM). See Massachusetts Appeals Court Record Appendix (hereinafter, R. App.) at 1, 113. DSM operates a highly successful chain of supermarkets located in northeastern Massachusetts and central and southern New Hampshire. It also has extensive real estate holdings, including numerous shopping centers that contain DSM stores. See *Demoulas I*, 424 Mass. at 504-507, 677 N.E. 2d at 165-167. Together, the two cases involved disputes over

assets worth hundreds of millions of dollars. R. App. at 95-106, 184-185.[1]

The lawsuits were brought by one branch of the Demoulas family (the Arthur S. Demoulas branch) against the other branch (the Telemachus Demoulas branch). The petitioner, Frances D. Kettenbach, is a daughter of Telemachus Demoulas. See *Demoulas III*, 428 Mass. at 556-557, 569, 703 N.E. 2d at 1154-1155, 1162.

The Arthur S. Demoulas side essentially alleged that the Telemachus Demoulas side of the family had defrauded them over a period of years. The first case (the "Stock Transfer Action") was a personal claim brought by the individuals of the Arthur S. side against the individuals of the Telemachus side. See *Demoulas III*, 428 Mass. 555, 703 N.E. 2d 1149 (1999). The focal point in the Stock Transfer Action was the allegation, denied by the defendants, that the Telemachus side had fraudulently induced the sale of the plaintiffs' stock in DSM, thereby shifting ownership of DSM from a corporation where fifty percent of the shares were held by the Arthur S. side and fifty percent by the Telemachus side, to one where the Telemachus side owned a substantial majority. The second case (the "Derivative Action") was a shareholder's derivative claim brought by Arthur S. Demoulas on behalf of DSM against individuals on the Telemachus side, as well as against business entities created and owned by these individuals. See *Demoulas I*, 424 Mass. 501, 677 N.E. 2d

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[1] In a later judicial disciplinary proceeding against her, arising out of an unrelated matter, the trial judge testified, "It involved what I understand to be over a billion dollars." Massachusetts Commission on Judicial Conduct, Matter of Investigation of the Honorable Maria I. Lopez, transcript of testimony Nov. 20, 2002, p. 76, R. App. at 904.

159 (1997). In the Derivative Action, the plaintiff alleged that the business entities created by the Telemachus side had wrongfully diverted corporate opportunities of DSM.

During acrimonious and widely publicized pretrial litigation from 1990 through 1994, both cases were assigned to Superior Court Judge Maria I. Lopez. R. App. at 194. In 1994, Judge Lopez first presided over the jury trial of the Stock Transfer Action. *Id.* At the close of that case, Judge Lopez directed a verdict in favor of the second generation of the Telemachus side (Telemachus's children). R. App. at 33. Thereafter, the jury found against Telemachus personally, in favor of the individuals on the Arthur S. side. R. App. at 34, 194.

Next, the Derivative Action was tried to Judge Lopez, sitting without a jury, over the course of six months, ending in May, 1995. R. App. at 194-195. The Supreme Judicial Court described the trial as "long, arduous, and, at times, very bitter." *Demoulas I*, 424 Mass. at 526, 677 N.E. 2d at 178. About six weeks after the close of the evidence, Judge Lopez issued a sweeping ruling against the Telemachus side. That ruling required the defendants to transfer to DSM all of the assets which the judge found to have been derived from corporate opportunities wrongfully diverted from DSM. R. App. at 162-163. The very next day, Judge Lopez, acting entirely on her own initiative, reached back one year and set aside the directed verdict in the Stock Transfer Action which she had granted in favor of Telemachus's children, and instead directed a verdict for the Arthur S. side. R. App. at 38-39. Telemachus's children were never given an opportunity to be heard or to offer evidence, as they would otherwise have done had it not been for the directed verdict.

(b) The motions for recusal

On three occasions, Judge Lopez denied the defendants' motions that she recuse herself from the case.[2] In each instance, her decision was affirmed by the Supreme Judicial Court.

The first recusal motion. Before the start of the trial in the Derivative Action, Judge Lopez denied the defendants' motion that she recuse herself from presiding over that trial, based on the perception of bias that she had created by certain statements she had made. R. App. at 152-153. On appeal, the Supreme Judicial Court affirmed her decision denying the motion to recuse, relying on its impression that

> "[she] appears to have concluded that she would be able to act fairly and impartially in deciding the issues in the shareholder derivative action, and that, objectively considered, the case was not a proceeding in which her impartiality might reasonably be questioned based on assertions of bias or prejudice concerning any party."

Demoulas I, 424 Mass. at 525, 677 N.E. 2d at 177.

---

[2] "Traditionally, 'recusal' has referred to a judge's voluntary, discretionary decision to step down in a case, while 'disqualification' refers to a motion for the statutorily or constitutionally mandated removal of a judge from a case. *See* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.1 at 4-5 (1986). However, 'in many jurisdictions the term "disqualification" has been defined in such a way as to include both removal by a judge on his own motion and removal at the request of a party. In fact in modern practice the terms "disqualification" and "recusal" are frequently viewed as synonomous and are often used interchangeably.' *Id.*" American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), p. 186.

The second recusal motion. In June, 1997, the defendants filed their second motion for recusal, after learning of allegations of extrajudicial contact between Judge Lopez and the lead counsel for the plaintiffs, Mr. Robert Gerrard. The allegations were supported by the statements of witnesses that Judge Lopez and Mr. Gerrard had had social contact on numerous occasions at a Boston restaurant owned by Judge Lopez's husband. R. App. at 193, 197-198, 1485-1486, 1488-1490. In addition to the motion to recuse, the defendant Arthur T. Demoulas filed a complaint against Judge Lopez with the Massachusetts Commission on Judicial Conduct (hereinafter, CJC) regarding the alleged conduct at the restaurant. R. App. at 450-451.

One month after the complaint to the CJC, Judge Lopez convened a hearing on the defendants' recusal motion. R. App. at 56-57. She proceeded to rule on it without affording the defendants the opportunity to present witnesses or the right to confront and cross-examine adverse witnesses. In her order, Judge Lopez stated that she had applied the test of Canon 3(C)(1)(a) (now recodified as Canon 3(E)(1)(A)) and had "examined [her] conscience [and] can impartially discharge the two remaining issues in these cases." *Demoulas III*, 428 Mass. at 545, 703 N.E. 2d at 1143-1144. See R. App. at 195. The Supreme Judicial Court affirmed Judge Lopez's decision. 428 Mass. at 552, 703 N.E. 2d at 1147.

The third recusal motion. In 1999, the defendants filed a third motion that Judge Lopez recuse herself, alleging (based on information developed by investigators acting in undercover roles) that she had told a law clerk,

> "before the trial of the [second case] commenced, that 'she knew who the "bad and the good guys were" and who the winners were going to be before the case began'; that 'he [the law clerk] will easily tell who was lying and that the [p]laintiff's physical evidence will be overwhelming'. . . ."

Demoulas IV, 432 Mass. at 47, 732 N.E. 2d at 87. Judge Lopez "denied the defendant children's motion[] to recuse without a hearing. Her order states that she applied the appropriate test governing a recusal request." 432 Mass. at 50, 732 N.E. 2d at 881. See R. App. at 90, 451. Judge Lopez once more had sat in judgment of her own conduct. In June, 2000, the Supreme Judicial Court affirmed her ruling. 432 Mass. at 55, 732 N.E. 2d at 884. In doing so, it acted for the third time in reliance upon Judge Lopez's assertion that she was completely impartial and that she had disclosed on the record all relevant facts.

(c) Subsequent revelations; the motions for relief from judgment

The CJC proceeding against Judge Lopez. Little more than a year after the Supreme Judicial Court's decision, during judicial disciplinary proceedings against her, Judge Lopez admitted to a very different state of mind. Her testimony before the CJC raised disturbing questions about the accuracy of her earlier representations and her compliance with the candor requirements of the rules governing judicial conduct.

In 2001, at a time when proceedings following the fourth appeal in these cases were still pending before Judge Lopez in the Superior Court, the CJC charged her with six counts of misconduct, in violation of twelve separate canons of the Code of Judicial Conduct. Commission on Judicial

Conduct, Matter of Investigation of the Honorable Maria I. Lopez, Report of Hon. E. George Daher, Hearing Officer (hereinafter, hearing officer's report), p. 1, R. App. at 746. The charges arose from a criminal trial, unrelated to the Demoulas proceedings, over which Judge Lopez had presided in August and September, 2000. Hearing officer's report, pp. 1-62, R. App. at 746-807.

One of the charges brought against Judge Lopez by the CJC resulted from her manifestly improper actions after receiving notice of a certain complaint against her, brought by an elderly nun, Sister Angela Beaucage. Transcript of hearing (hereinafter, Tr.) Oct. 31, 2001, pp. 152-153, R. App. at 742. Hearing officer's report, pp. 62-66, R. App. at 807-811. On receiving notice of Sister Beaucage's complaint, Judge Lopez placed an anonymous telephone call on November 1, 2000, just after 11:00 P.M., to the complainant's home. Hearing officer's report, p. 62, R. App. at 807. During her testimony in connection with the CJC investigation, Judge Lopez explained her telephone call as a reasonable reaction to what she described as "persecution" she suffered at the hands of her "enemies," namely, the Demoulas defendants.

> Q. "Why did you take matters into your hands at that point, that night at eleven o'clock?"
>
> A. "Well, you know what. I think I was a little frustrated. I was a little concerned because I have been persecuted by some very powerful enemies I made in a very big case. And I'm sure you're not familiar with what I went through with the Demoulas losing side and their lawyers . . . I truly believed – and I still believe it to this day that even if she's a real person . . . she [Sister

> Beaucage] could have been put up to it [by the Demoulas defendants]."

Tr. Oct. 31, 2001, p. 154, R. App. at 743. Additionally, Judge Lopez, in equally bizarre testimony, asserted that she was "persecuted," "besieged," and "attacked" by the Demoulas defendants and their counsel, Tr. Nov. 20, 2002, pp. 74, 83, R. App. at 903, 905, and that the defendants and their counsel instigated or filed false affidavits against her, had her followed, searched her trash, placed electronic listening devices in her home and her judicial chambers, and illegally reviewed her financial records. Tr. Oct. 31, 2001, p. 154, R. App. at 743. Tr. Nov. 20, 2002, pp. 78-79, R. App. at 904. Indeed, Judge Lopez speculated that many of the complaints brought by the CJC, not only Sister Beaucage's, were attributable to her "enemies," the Demoulas defendants:

> A. " . . . [G]iven my experience in the Demoulas case and what I have been through, and if the FBI would share with you some of the strategies that they've employed against me to discredit me, I would believe that they would hire firms to get complaints out, to call, you know, state [representatives] to create a huge, huge issue over me.
>
> "So I suspect that a number of these complaints were instigated by Demoulas, the loser side, and their lawyers."
>
> Q. "You're saying that even today with regard to complaints before the Commission in this *Horton* matter, that you believe some percentage of those have been inspired by Demoulas enemies?"
>
> A. "More that inspired. I believe that given my experience over the years, what I've gone

> through for three or four years in the Demoulas litigation, I believe that getting people to write complaints about me, to call their state [representatives], would be consistent and even – I mean doesn't even compare to some of the egregious things they've done to me.
>
> "So yes, I believe that. I believe the media attention was probably instigated by them.
>
> "You know, I'm a victim here. . . ."

Tr. Oct. 31, 2001, pp. 159-160, R. App. 744.

On April 9, 2003, the defendants moved for relief from judgment in both cases. Appendix G, p. App. 27. Judge Lopez resigned after the hearing officer in the CJC proceeding issued his decision concluding that she had violated several of the canons of judicial conduct. Hearing officer's report, pp. 37-91, R. App. at 782-836. The defendants' motions for relief from judgment were referred to a different judge of the Superior Court. R. App. at 111, 191.

(d) The time and manner of raising the Federal questions sought to be reviewed

Federal due process claims were advanced at every stage of the proceedings on the defendants' motions for relief from judgment – before the motion judge, the Appeals Court, and the Supreme Judicial Court. Notwithstanding the fact that the defendants, including the petitioner, persistently challenged the judgments on Federal constitutional grounds, no State Court ever rendered a decision on the merits of their federally-based contentions. See Appendix A, p. App. 1; Appendix B, p. App. 3; Appendix C, p. App. 5. The relevant materials before the motion judge in the

Superior Court are reproduced in Appendix G, p. App. 27, and Appendix H, p. App. 31.

After the motion judge in the Superior Court had denied relief from judgment, the defendants next advanced their Federal constitutional contentions in the Appeals Court. Relevant portions of their brief dated December 10, 2003, are reproduced in Appendix I, p. App. 36. See also the defendants' reply brief, the relevant portion of which is reproduced in Appendix J, p. App. 41.

Finally, the petitioner specifically asked the Supreme Judicial Court to consider the vital question whether the recusal test itself is unconstitutional on the ground that it abridges federally guaranteed due process rights. Appendix K, p. App. 45.

REASONS FOR ALLOWANCE OF THE WRIT

I. REVIEW IS NECESSARY BECAUSE MASSACHUSETTS JUDICIAL RECUSAL PROCEDURES, WHICH PERMIT A JUDGE TO SIT IN JUDGMENT OF HER OWN ALLEGED MISCONDUCT, VIOLATE FEDERAL DUE PROCESS GUARANTEES AND ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT

A. The Judge Exhibited Actual Bias

When she ruled on the defendants' three motions seeking her recusal, Judge Lopez effectively was sitting as judge in her own cause. On the basis of ancient nonconstitutional principles, as well as plain common sense, this was impermissible. See *Earl of Derby's Case*, 77 Eng. Rep. 1390 (K.B. 1614), in which Lord Chief Justice Coke declared, "No man can be a judge in his own cause." See, to

the same effect, *Bonham's Case*, 77 Eng. Rep. 646 (K.B. 1609); Note, Disqualification of Judges for Bias in the Federal Courts, 79 Harv. L. Rev. 1435, 1435-1436 (1966). This Court, while recognizing that the Constitution does not reach every issue of judicial qualification, has reasoned, "[I]t certainly violates the Fourteenth Amendment . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927). Similarly, this Court has concluded that, under the due process clause, no judge "can be a judge in his own case [or be] permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955) (Black, J.). The Court in *Murchison* acknowledged that the degree or kind of interest sufficient to disqualify a judge from sitting "cannot be defined with precision." *Ibid.* More recently, it has stated that "a reasonable formulation of the issue is whether the 'situation is one "which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true."'" *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 822 (1986), quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972).

Due process "requires a 'fair trial in a fair tribunal' . . . before a judge with no actual bias against the defendant or interest in the outcome of his particular case." *Bray* v. *Gramley*, 520 U.S. 899, 904-905 (1977), quoting *Withrow* v. *Larkin*, 421 U.S. 35, 46 (1975). The "interest" deemed constitutionally sufficient to preclude a judge's participation in a particular case has been pecuniary, *Aetna Life Ins. Co.* v. *Lavoie*, *supra* (judge's decision enhanced his likelihood of favorable settlement in his own litigation);

institutional, *Ward* v. *Village of Monroeville*, *supra* (mayor presided over court which was significant source of municipal revenue); or personal, *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971) (judge had been vilified by defendant in contempt proceeding). In addition to these interests, this Court should also recognize a judge's professional and intellectual stake in asserting her impartiality and in affirming the propriety of her conduct. "For many, if not most, figures in public life, avoiding a cloud over one's professional judgment is a consideration a great deal more important than financial gain." *DelVecchio* v. *Illinois Dep't of Corrections*, 31 F.3d 1363, 1399 (7th Cir. 1994) (Ripple, J., dissenting), cert. denied, 514 U.S. 1037 (1995). See *State* v. *O'Neill*, 261 Wis. 2d 534, 547, 663 N.W. 2d 292, 299 (Wis. App. 2002) (noneconomic interest may require recusal on due process grounds). That is the situation here. Judge Lopez had been specially assigned to the *Demoulas* litigation. R. App. at 193. She repeatedly showed a strong, indeed tenacious, desire to remain on these cases. Her overriding personal interests, together with the bias revealed in the CJC hearings, made totally unrealistic the self-analysis prescribed by the Massachusetts judicial recusal test. See Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736, 755-756 (1973) (noneconomic interests requiring disqualification).

It is rare for a judge's bias to be established by his or her own words. In *Berger* v. *United States*, 255 U.S. 22, 32-36 (1921), this Court acted decisively under the recusal statute (28 U.S.C. § 144, as then in effect), to make clear that two defendants of German ancestry could not be subjected to trial before a judge who had publicly slurred people of German origin. The case at bar presents a

similar situation in that Judge Lopez's sworn testimony before the CJC unmistakably demonstrates paranoia, bias, and partiality. If Judge Lopez believed that the defendants (her "enemies") had had her followed, searched her trash, eavesdropped on her, and illegally reviewed her financial records, she was obviously incapable of being impartial. Her testimony projected actual bias which precludes dispassionate judgment. The record leaves one "with an abiding impression that the trial judge permitted [herself] to become personally embroiled" with the case. *Ungar* v. *Serafite*, 376 U.S. 575, 585 (1964). See *Offutt* v. *United States*, 348 U.S. 11, 17 (1954). Even though Federal due process principles required that the petitioner be afforded a hearing to determine the extent of Judge Lopez's bias, and how and when such bias developed, the Massachusetts courts denied her that right.

B. The Strong Appearance of Bias Was Present

The due process clause requires a judge to recuse herself without a showing of actual bias where a sufficient motive to be biased exists. See *Tumey* v. *Ohio*, 273 U.S. 510, 532 (1927). Where temptations "not to hold the balance nice, clear, and true" exist, due process principles "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between the contending parties. . . . But to perform its high functions in the best way, 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955) (citations omitted). *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 875 (1986). See *Alexander* v. *Primerica Holdings, Inc.*, 10 F.3d 155, 166 (3d Cir. 1993) ("[w]hen the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially

pronounced"). In the *Demoulas* litigation, with the exception of the trial of the Stock Transfer Action, all of the decisions were made by Judge Lopez without a jury. The appearance of bias is overwhelming; the appearance of justice is conspicuously lacking.

On three occasions the judge denied the defendants' motions that she recuse herself. She denied the defendants a meaningful hearing on two of their recusal motions. R. App. at 858, 451. Nevertheless, in the denial of the defendants' motions for relief from judgment, both the Superior Court motion judge (Appendix B, p. App. 3) and the Appeals Court (Appendix A, p. App. 1) relied on Judge Lopez's findings on the recusal issue. The appearance of bias was created by Judge Lopez's conduct that prompted the defendants' recusal motions, by her treatment of the motion proceedings, and by her subsequent CJC testimony.

Courts in several States, but not Massachusetts, have held that the appearance of bias or impropriety, as distinct from actual bias or impropriety, is sufficient to implicate due process rights. See, *e.g.*, *Commonwealth* v. *Brandenburg*, 114 S.W. 3d 830 (Ky. 2003) (recusal of trial court commissioner was constitutionally required by appearance of impropriety); *Wolfkill Feed & Fertilizer Corp.* v. *Martin*, 103 Wash. App. 836, 14 P.3d 877 (2000) (due process, the appearance of fairness, and the Code of Judicial Conduct all require disqualification of judge whose impartiality might reasonably be questioned). In *Brengelmann* v. *Land Resources of New England & Canada, Inc.*, 393 A.2d 174, 178 (Me. 1978), the Supreme Judicial Court of Maine ruled:

> "[The appellant] . . . correctly argues that the Supreme Court of the United States has recognized that even where actual bias or prejudice on the part of a Judge is not, or cannot be, shown, in some kinds of circumstances a *per se* prophylactic rule of judicial disqualification is operative to guarantee due process of law. There are patterns of circumstances as to which 'experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable.' See *Withrow* v. *Larkin*, 421 U.S. 35, 47 . . . (1975)."

Decisions of the United States Courts of Appeals in two Circuits suggest a line of authority adopting a contrary position. *DelVecchio* v. *Illinois Dep't of Corrections*, 31 F.3d 1363, 1370-1380 (7th Cir. 1994) (rehearing en banc; appearance of partiality not requiring recusal of State court judge), cert. denied, 514 U.S. 1037 (1995). *Johnson* v. *Carroll*, 369 F.3d 253, 260 (3d Cir. 2004) (appearance of bias, without more, not requiring State judge to recuse himself *sua sponte* under due process clause), petition for cert. filed, No. 04-7553. Review by this Court is warranted in order to resolve this conflict as to the boundaries of the due process protections afforded to litigants in State courts.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT AMONG STATE COURTS AFFECTING THE DUE PROCESS RIGHTS OF LITIGANTS SEEKING RECUSAL OF A JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE QUESTIONED

The American Bar Association's Model Code of Judicial Conduct, which is the source of Massachusetts Supreme Judicial Court Rule 3:09, Canon 3(E)(1)(a), does not

address the methods for handling a motion for recusal. See American Bar Association, *Annotated Model Code of Judicial Conduct* (2004), pp. 184-251. In a majority of the States, including Massachusetts, the decision whether to grant or deny a motion to recuse reposes within the sound discretion of the challenged judge. See Leslie W. Abramson, Deciding Recusal Motions: Who Judges the Judges? 28 Val. U. L. Rev. 543, 545-547 & n. 5 (1994) (identifying, as of 1994, the twenty-seven States in which the challenged judge rules on the motion to disqualify). In several other jurisdictions, the challenged judge may decide only the timeliness of the motion and the legal sufficiency of the supporting affidavit. If the challenged judge finds that the motion is timely and that recusal would be required if some or all of the facts set forth in the affidavit are true, then another judge is assigned to consider the motion. *Id.*, at 552-553. In the remaining States, the challenged judge must, in every instance, transfer the recusal motion to a different judge. *Id.*, at 553-558.

Even in jurisdictions where the challenged judge is normally permitted to rule on the merits of a recusal motion, courts have recognized situations where self-analysis by an obviously biased judge is impossible. Simply to trust the integrity of such a judge rests on a fundamentally flawed assumption. Thus in *Surratt* v. *Prince George's County*, 320 Md. 439, 466, 578 A.2d 745, 758 (1990), the Maryland Court of Appeals, citing the Federal recusal statute, 28 U.S.C. § 144, and expressing due process concerns, held that "when the asserted basis for recusal is personal conduct of the trial judge . . . then the trial judge must permit another judge to decide the motion for recusal." Accord, *Gillum* v. *United States*, 613 A.2d 366, 369 (D.C. 1992). An opinion of the Second

Circuit has stated, "A claim of personal bias and prejudice strikes at the integrity of the judicial process, and it would be intolerable to hold that the disclaimer of prejudice by the very jurist who is accused of harboring it should itself terminate the inquiry until an ultimate appeal on the merits." *In re International Bus. Machs. Corp.*, 618 F.2d 923, 926-927 (2d Cir. 1980) (mandamus as remedy for judge's wrongful refusal to disqualify himself). By contrast, current Massachusetts jurisprudence would protect a judge who chooses bias, or even a corrupt judge, who simply recites the Supreme Judicial Court's recusal formula from *Lena* v. *Commonwealth*, 369 Mass. 571, 575, 340 N.E. 2d 884, 886-887 (1976), quoted *supra*, p. i.

As discussed in part I, *supra*, the decisions of this Court establish that both bias and the appearance of bias on the part of State-court judges have a Federal constitutional dimension. For this reason, review is warranted in order to resolve the conflict between State courts as to precisely how the due process rights of litigants are to be protected.

III. THE PETITIONER ACTED IN A TIMELY MANNER IN ADVANCING HER CONTENTION THAT THE MASSACHUSETTS JUDICIAL RECUSAL PROTOCOL ABRIDGED HER FEDERALLY SECURED DUE PROCESS RIGHTS

For three reasons, the petitioner's due process contention was appropriately made in the first instance in her application for discretionary review by the Supreme Judicial Court.

First, and foremost, the petitioner was advocating the alteration of an established rule of law. Under precedent

dating from the Appeals Court's first year of operation, that Court has never assumed the authority to alter an established rule of law, such as the judicial recusal protocol, once such a rule has been laid down by the Supreme Judicial Court. *Burke* v. *Toothaker*, 1 Mass. App. Ct. 234, 239, 295 N.E. 2d 184, 186-187 (1973) (rule of substantive liability). *Commonwealth* v. *Pugh*, 2 Mass. App. Ct. 903, 904 (1974), 320 N.E. 2d 841 (evidentiary rule). In this regard, the views of a retired Justice of the Supreme Judicial Court, who formerly held the position of reporter for this Court's Advisory Committee on the Federal Rules of Civil Procedure, are particularly instructive: "[W]here a sequence of decisions of the supreme court of the State [is] unimpaired, . . . the intermediate court is not to make law but to follow orders." Benjamin Kaplan, Do Intermediate Appellate Courts Have a Lawmaking Function? 70 Mass. L. Rev. 10, 13 (1984). On several occasions, the Supreme Judicial Court has granted discretionary review in order to modify a settled rule of law. See, *e.g.*, *McDonough* v. *Whalen*, 365 Mass. 506, 511-512, 313 N.E. 2d 435, 438-439 (1974); *Erhard* v. *F.W. Woolworth Co.*, 374 Mass. 352, 357, 372 N.E. 2d 1277, 1280-1281 (1978), each case announcing a new rule of law different from that applied by the Appeals Court. This is what the petitioner would have asked the Supreme Judicial Court to do if it had granted further appellate review in this case.

Second, the petitioner would have sought on further appellate review to invoke the power of superintendence over inferior courts. By statute, this power is specifically reserved to the Supreme Judicial Court. Mass. Gen. L. c. 211, § 3 (West 2005). See Daniel J. Johnedis, Massachusetts' Two-Tier Appellate System in Operation, 60 Mass. L.Q. 77, 88 (1973) (Appeals Court lacking power to establish new

procedural rules applicable to inferior courts; author was then chief staff counsel to Supreme Judicial Court).

Third, the petitioner, on further appellate review, would have challenged the constitutionality of the Supreme Judicial Court's exercise of its own rule making power. See *Matter of Jadd*, 391 Mass. 227, 461 N.E. 2d 760 (1984), where the Supreme Judicial Court held that its rule prescribing a residency requirement for attorneys seeking admission on motion to the Massachusetts bar violated the privileges and immunities clause of the United States Constitution. U.S. Const., art. 4, § 2, cl. 1. In the present case, the petitioner's remedy lay exclusively within the province of the Supreme Judicial Court. That Court refused to consider the merits of her Federal constitutional claim.

IV. THE PETITIONER'S DUE PROCESS CLAIM IS NOT PROCEDURALLY FORECLOSED, BECAUSE THE DECISION OF THE MASSACHUSETTS APPEALS COURT DID NOT REST ON AN INDEPENDENT AND ADEQUATE STATE-LAW GROUND

The Massachusetts Appeals Court never reached the merits of the defendants' due process contentions. See Appendix A, pp. App. 1-App. 2. That Court based its decision on two State-law grounds: *first*, that the motions for relief from judgment were untimely, see Appendix F, pp. App. 19-App. 22, and *second*, that the issues that the defendants sought to raise were barred by the law-of-the-case doctrine, see Appendix F, pp. at App. 22-26. Neither is a State-law ground of the character that would foreclose this Court's review of the petitioner's due process claim.

This Court will not review a question of Federal law decided by a State court if the decision of the State court rests on a State-law ground that is independent of the Federal question and is adequate to support the judgment. *Lambrix* v. *Singletary*, 520 U.S. 518, 522-523 (1997). See *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This principle applies whether the State-law ground is substantive or procedural. *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991). However, this Court recognizes that "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). Thus, for a State procedural rule to be adequate to foreclose review of a Federal claim, this Court requires that it be "firmly established and regularly followed." *James* v. *Kentucky*, 466 U.S. 341, 348-349 (1984). As will be apparent from the discussion *infra*, part IV-A, neither State-law ground adopted by the Massachusetts Appeals Court meets this demanding test.

This Court also acknowledges the existence of "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002). A State procedural ground is "adequate" only where "the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Wainwright* v. *Sykes*, 433 U.S. 72, 83 n. 8 (1977) (citation omitted). See *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice"). See also Daniel J. Meltzer, State Court

Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1142 (1986) ("[T]he most important category of inadequate State grounds includes those rules that, even if fairly and consistently applied, heavily burden the assertion of federal rights without significantly advancing any important state policy"). In this case the defendants' assertion of Federal due process rights was "plainly and reasonably made" at each stage of the proceeding. Furthermore, the presence of unique circumstances, bearing directly upon the integrity of the judicial process itself, make this an "exceptional case" within the contemplation of the Court in *Lee* v. *Kemna*, 534 U.S. at 376.

A. The State Procedural Grounds Identified by the Massachusetts Appeals Court Are Neither Firmly Established Nor Regularly Followed

1. The Massachusetts Courts Do Not Require that a Motion for Relief from Judgment Based on a Claim of Fraud Upon the Court Be Brought Within One Year After the Judgment Was Entered

The plaintiffs argued, and the Appeals Court appears to have believed, that the defendants' motion for relief from judgment, framed under Mass. R. Civ. P. 60(b), 365 Mass. 828 (1974), was subject to the one-year period of limitation applicable to motions brought pursuant to rule 60(b)(1), (2), and (3) because it was based on "fraud," namely Judge Lopez's failure to disclose her bias against the defendants. Compare Mass. R. Civ. P. 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). See Appendix A, pp. App.1-App. 2, adopting pp. 24-29 of the plaintiff's brief on appeal. See Appendix F,

at pp. App. 19-App. 22. The Massachusetts courts, however, have no "firmly established and regularly followed" practice of treating this kind of fraud as being governed by the one-year limitation period. No published decision indicates that the Supreme Judicial Court would do so. To the contrary, the courts have consistently distinguished between fraud committed by a litigant, on the one hand, and fraud committed by the Court, its personnel, or its officers, *i.e.*, "fraud upon the court," on the other. *MacDonald* v. *MacDonald*, 407 Mass. 196, 202, 552 N.E. 2d 533, 536 (1990). When it comes to a fraud upon the Court, "[t]here is no time limitation that would bar a judge from setting aside a judgment." *Sahin* v. *Sahin*, 435 Mass. 396, 405-406, 758 N.E. 2d 132, 140-141 (2001). See *MacDonald*, 407 Mass. at 202 n. 10, 552 N.E. 2d 536 n. 10; *Winthrop Corp.* v. *Lowenthal*, 29 Mass. App. Ct. 180, 183, 558 N.E. 2d 1138, 1140 (1990). See also *In re Tri-Cran, Inc.*, 98 B.R. 609, 614-616 (Bankr. D. Mass. 1989) ("To vindicate the integrity of the judicial process, a court may entertain a complaint for fraud on the court long after the judgment itself was entered," *id.*, at 614) (citation omitted).

It is beyond question that the "fraud" at issue here was "fraud on the Court." Accordingly, in light of these precedents, Massachusetts has no "firmly established and regularly followed" practice which would impose the one-year limitation period to bar the defendants' motions for relief from judgment. Therefore, the timeliness of the defendants' motions, in relation to the one-year limitation period, does not constitute an independent and adequate State-law ground foreclosing this Court's review of the petitioner's due process claim. The motions for relief from judgment were brought, in a timely manner, shortly after

the defendants became aware of Judge Lopez's testimony before the CJC. R. App. at 461.

2. The Law-of-the Case Doctrine Is a Permissive, Nonmandatory Policy

The Appeals Court adopted the plaintiffs' argument that the Supreme Judicial Court's decisions affirming the denial of the defendants' three previous motions seeking the recusal of Judge Lopez constitute the "law of the case" and, accordingly, compelled the denial of their motion under Mass. R. Civ. P. 60(b) for relief from judgment. See Appendix A, pp. App. 1-App. 2, adopting pp. 39-43 of the plaintiffs' brief on appeal. See Appendix F, pp. App. 22-App. 26. To the contrary, the law-of-the-case doctrine has no application here. Far from being a procedural rule "firmly established and regularly followed" in the Massachusetts courts, the law-of-the-case doctrine in Massachusetts is merely a permissive, nonmandatory policy that "reflects th[e] court's reluctance 'to reconsider questions decided upon an earlier appeal in the same case.'" *King* v. *Driscoll*, 424 Mass. 1, 7-8, 673 N.E. 2d 859, 863 (1996), quoting from *Peterson* v. *Hopson*, 306 Mass. 597, 599, 29 N.E. 2d 140, 143 (1940). *Vittands* v. *Sudduth*, 49 Mass. App. Ct. 401, 413 n. 19, 730 N.E. 2d 325, 337 n. 19 (2000). See *Conley* v. *United States*, 323 F.3d 7, 13 (1st Cir. 2003) (law of the case can be avoided where, for example, "there has been a change in prevailing law or where there is new evidence on the question at issue").

As simply stated, the doctrine provides that an issue, "once decided, should not be reopened 'unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the

law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.'" *King* v. *Driscoll*, 424 Mass. at 8, 673 N.E. 2d at 863, quoting from *United States* v. *Rivera-Martinez*, 931 F.2d 148, 151 (1st Cir.), cert. denied, 502 U.S. 862 (1991). The law-of-the-case doctrine is inapplicable when new facts or evidence bearing on a previously-decided issue has been discovered and brought before the Court. This case presents precisely the situation, foreseen by the opinion in *King* v. *Driscoll*, *supra*, in which the Massachusetts courts have heretofore declared their willingness to reexamine a decision that would work manifest injustice if allowed to stand. No published decision of the Supreme Judicial Court indicates that law-of-the-case principles would interpose a bar to the petitioner's assertion in that Court of her Federal constitutional rights. In the present case, newly discovered evidence that parties were denied their due process rights should have received a hearing, especially when that newly discovered evidence is the sworn testimony of the trial judge herself, who built the "law of the case" in the first instance. The law-of-the-case doctrine cannot be an independent and adequate State-law ground such as to foreclose review of the petitioner's Federal due process claim by this Court.

B. No Massachusetts State Policy Would Be Served by Burdening the Petitioner's Assertion of Her Federal Rights

A State-law ground, to be adequate to justify this Court's abstention from reviewing the petitioner's due process claim, must advance a legitimate State interest. *Wainwright* v. *Sykes*, 433 U.S. 72, 83 n. 8 (1977). *Trevino* v. *Texas*, 503 U.S. 562, 566-567 (1992) (per curiam) (State's

formulaic interest in its procedural rules inadequate to bar review of Federal claim). In the highly unusual circumstances of this case, adherence to State procedural formalities – either the law-of-the-case principle or the one-year limitation period for bringing the defendants' motion – would advance no conceivable State interest. The overarching State interest in this case is "the purity of the judicial process and its institutions." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437, 439-440 (5th Cir. 1968) (holding that the doctrines of res judicata and collateral estoppel were inapplicable to a motion for relief from judgment under Fed. R. Civ. P. 60(b), based on 28 U.S.C. § 455, where supplementary facts were added in the subsequent motion to vacate). Legitimate State interest favors this Court's review of the petitioner's due process claim.

The need for an objective determination of a trial judge's impartiality is grounded not only in the litigants' constitutional right to due process, but also in the public's right to a judicial system in which it can have confidence. No previous appellate consideration of this case has determined the constitutionality of the Massachusetts judicial recusal formula. It is essential to the public's continued confidence in the judiciary that the petitioner's constitutional contention receive review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS B. MERRITT
Counsel of Record for Petitioner
26 Cottage Street
Post Office Box 324
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APPENDIX A

816 N.E.2d 559 (Table)

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.

Rafaele L. DEMOULAS, administratrix,[1] & others,[2]

v.

Telemachus A. DEMOULAS & others[3]
(and a companion case[4]).

No. 03-P-1255.

Oct. 26, 2004.

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

For substantially the reasons set forth in the motion judge's decision dated July 3, 2003, as well as for substantially those reasons set forth in the appellees' brief at pages twenty-four through twenty-nine and thirty-nine

---

[1] Of the estate of Evan G. Demoulas and as next friend of Vanessa Evan Demoulas.

[2] Diana D. Merriam, Fotene J. Demoulas, Arthur S. Demoulas, and Evanthea Demoulas.

[3] Arthur T. Demoulas; Frances D. Kettenbach; Glorianne D. Farnham; Caren D. Pasquals; and Demoulas Super Markets, Inc.

[4] Arthur S. Demoulas v. Demoulas Super Markets, Inc.; Valley Properties, Inc.; Market Basket, Inc.; Doric Development Corp.; Lee Drug, Inc.; and Telemachus A. Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham, and Caren D. Pasquale, individually and, where applicable, as general partners of 231 Realty Associates.

through forty-three, we discern no abuse of discretion in the judge's denial of the defendant's rule 60(b) motion.

Assuming Attorney Gerrard's affidavits consisted wholly of inadmissible hearsay (but see Appellee Br. at 46-47), they formed no large part of the motion judge's decision – or our disposition – and admission was beyond doubt harmless.

Order denying emergency motion to strike affidavit of Robert C. Gerrard and for other relief affirmed.

Order denying motion for relief from judgment affirmed.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. **SUPERIOR COURT**
CIVIL ACTION
NOS. 90-2927 and 90-2344

ARTHUR S. DEMOULAS, ET AL. PLAINTIFFS

vs.

DEMOULAS SUPERMARKETS, INC., ET AL., DEFENDANTS

MEMORANDUM OF DECISION AND ORDER ON EMERGENCY MOTION OF DEFENDANTS' TELEMACHUS DEMOULAS ET. AL. FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)

After review of the filings on this motion, and the applicable Supreme Judicial Court decisions on the case, I conclude that no substantial issue is raised by the motion, that no hearing is necessary, and that defendants' motion must therefore be denied. Justice Lopez's testimony before the Judicial Conduct Commission does not evidence any bias against the defendants which may have affected her rulings. That Justice Lopez was upset at the false allegations made against her by the defendants' attorneys may have been true, but there is no evidence that she did not do exactly as she said in her Memorandum of Decision dated July 22, 1997, namely, to separate her feelings about having her integrity unfairly challenged from her responsibility to make fair and impartial rulings.

ORDER

The emergency motion of defendants' Telemachus Demoulas et. al. for relief from judgment is ***denied.***

/s/ Patrick F. Brady
Patrick F. Brady
Justice, Superior Court

3 July 03
Entered 7/10/03

APPENDIX C

Supreme Judicial Court for
the Commonwealth of Massachusetts
One Beacon Street, Third Floor,
Boston, Massachusetts 02108
(617) 557-1020

Thomas B. Merritt, Esquire
26 Cottage Street
P.O. Box 324
Littleton, NH 03561-0324

RE: Docket No. FAR-14482

RAFAELE L. DEMOULAS, administratrix, & others
vs.
TELEMACHUS A. DEMOULAS & others (and a companion case)

Middlesex Superior Court No. MICV1990-02344
A.C. No. 2003-P-1255

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 12/23/04, the above-captioned Application for Further Appellate Review was denied. (Sosman, J., recused)

Susan Mellen, Clerk

Dated: December 23, 2004

To: Robert C. Gerrard, Esquire
J. Owen Todd, Esquire
Carol R. Cohen, Esquire
Shepard Davidson, Esquire
Andrea Saunders Batchelder, Esquire
Lawrence G. Green, Esquire
Joseph P. Messina, Esquire
Thomas B. Merritt, Esquire
Atty. Paul M. Wolff

Atty. Barnet Phillips, IV
Richard J. Yurko, Esquire
Thomas J. Dougherty, Esquire
Christine M. Roach, Esquire

APPENDIX D

United States Constitution, amend. 14, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Massachusetts Declaration of Rights, art. 11

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Massachusetts Declaration of Rights, art. 29

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial

court should hold their offices as long as they behave themselves well; and that they should receive honorable salaries ascertained and established by standing laws.

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28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

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28 U.S.C. § 455

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

GENERAL LAWS OF MASSACHUSETTS

Chapter 211: Section 3 Superintendence of inferior courts; power to issue writs and process

Section 3. The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy; and provided, further that general superintendence also shall not include the authority or power to exercise or supersede any of the powers, duties and responsibilities of the chief justice for administration and management, as established by section one of chapter two hundred and eleven B, in any general or special law except under extraordinary circumstances leading to a severe, adverse impact on the administration of justice; provided, that the majority of the supreme judicial court shall issue a written order that sets forth the basis for a finding that, absent such action, there would be a severe and adverse impact on the administration of justice in the commonwealth. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

APPENDIX E

Massachusetts Supreme Judicial Court Rule 3:09, Canon 3

E. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer; . . .

Massachusetts Appeals Court Rule 1:28 SUMMARY DISPOSITION (Applicable to all cases.)

At any time following the filing of the appendix (or the filing of the original record) and the briefs of the parties on any appeal in accordance with the applicable provisions of Rules 14(b), 18, and 19 of the Massachusetts Rules of Appellate Procedure, a panel of the justices of this court may determine that no substantial question of law is presented by the appeal or that some clear error of law has been committed which has injuriously affected the substantial rights of an appellant and may, by its written order, affirm, modify or reverse the action of the court below. The panel need not provide an opportunity for oral argument before disposing of cases under this rule. Any order entered under this rule shall be subject to the provisions of Rules 27 and 27.1 of the Massachusetts Rules of Appellate Procedure.

Mass. R. Civ. P. 60. RELIEF FROM JUDGMENT OR ORDER

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to file for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Mass. R. App. P. 27.1 FURTHER APPELLATE REVIEW

(a) Application; When Filed; Grounds. Within twenty days after the date of the rescript of the Appeals

Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

(b) Contents of Application; Form. The application for leave to obtain further appellate review shall contain, in the following order: (1) a request for leave to obtain further appellate review; (2) a statement of prior proceedings in the case (including whether any party is seeking a rehearing in the Appeals Court); (3) a short statement of facts relevant to the appeal (but facts correctly stated in the opinion, if any, of the Appeals Court shall not be restated); (4) a statement of the points with respect to which further appellate review of the decision of the appeals court is sought; and (5) a brief statement (covering not more than ten pages of typing), including appropriate authorities, indicating why further appellate review is appropriate. A copy of the rescript and opinion, if any, of the Appeals Court shall be appended to the application. In addition, if the Appeals Court entered a memorandum and order under Appeals Court Rule 1:28 which refers to another document, such as a brief or judge's findings and rulings, a copy of that document, or, if appropriate, the pertinent pages of that document, shall be appended to the application. The application shall comply with the requirements of Rule 20.

(c) Opposition; Form. Within ten days after the filing of the application, any other party to the appeal may, but need not, file and serve an opposition thereto (covering not more than ten pages of typing) setting forth reasons why

the application should not be granted. The opposition shall not restate matters described in subdivision (b)(2) and (3) of this rule unless the opposing party is dissatisfied with the statement thereof contained in the application. An application shall comply with the requirements of Rule 20.

(d) Filing; Service. One copy of the application and one copy of each opposition shall be filed in the office of the clerk of the Appeals Court. An original and seventeen copies of the application and of each opposition shall be filed in the office of the clerk of the full Supreme Judicial Court. Filing and service of the application and of any opposition shall comply with Rule 13.

(e) Vote for further appellate review; certification. If any three justices of the Supreme Judicial Court shall vote for further appellate review for substantial reasons affecting the public interest or the interests of justice, or if a majority of the justices of the Appeals Court or a majority of the justices of the Appeals Court deciding the case shall certify that the public interest or the interests of justice make desirable a further appellate review, an order allowing the application or the certificate, as the case may be, shall be transmitted to the clerk of the Appeals Court; upon receipt, further appellate review shall be deemed granted. The clerk shall forthwith transmit to the clerk of the full Supreme Judicial Court all papers theretofore filed in the case and shall notify the clerk of the lower court that leave to obtain further appellate review has been granted.

(f) Briefs. Any party may apply to the Supreme Judicial Court within ten days after the date on which the appeal is docketed in the full Supreme Judicial Court for permission to file a new brief. If the application is granted,

the new brief must be filed in accordance with the briefing schedule established by the Clerk of the Supreme Judicial Court, and the court may impose terms as to the length and filing of such brief and any response thereto. If a new brief is filed, it will be considered in lieu of the Appeals Court brief. If permission to file a new brief is denied or not sought, cases in which further appellate review has been granted shall be argued on the briefs filed in the Appeals Court.

(g) Order of Argument. The applicant for leave to obtain further appellate review will argue first unless the court directs or the parties agree otherwise

* * *

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NOS. 2003-P-1255 and 2003-P-1256 (Consolidated)

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, *et al.*
Plaintiffs-Appellees

v.

TELEMACHUS A. DEMOULAS, *et al.*
Defendants-Appellants.

ARTHUR S. DEMOULAS,
Plaintiff-Appellee

v.

DEMOULAS SUPER MARKETS, INC., *et al.*
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF
THE SUPERIOR COURT OF MIDDLESEX COUNTY
(BRADY, J.)

BRIEF OF THE PLAINTIFFS-APPELLEES ARTHUR S. DEMOULAS, FOTENE J. DEMOULAS, DIANA D. MERRIAM and EVANTHEA DEMOULAS

Robert C. Gerrard/BBO#189800
Carol R. Cohen/BBO#088660
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Dated: February 9, 2004

* * *

ARGUMENT

I. DEFENDANTS' MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO MASS. R. CIV. P. 60(B) IS UNTIMELY

The relief requested by the defendants comes far too late in the game. Defendants' contention, in essence, is that relief from final judgments entered in August 10, 2000 (A.95, stock transfer actions) and March 25, 1999 (A. 184, shareholder derivative action) is warranted because they have unearthed newly discovered evidence of fraudulent conduct at work during these proceedings, namely, the purported bias of the Judge Lopez. In the Defendants' own words, the allegations upon which they ground their request for relief fall squarely within the reasons enumerated in subsections 1-3 of Rule 60(b). Defendants' Brief at 26.

A. Defendants' Motion For Relief From Judgment Is Subject To The One-Year Time Limitation Applicable to Rule 60(b)(1-5).

Defendants' motion for relief from judgment was subject to the one year time restriction imposed by Rule 60(b) and was not eligible for the more forgiving time-frame afforded by the catchall provision of Rule 60(b)(6). Rule 60(b) enables a court to relieve a party from a final judgment, in the event of

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> . . .
>
> (6) any other reason justifying relief from the operation of the judgment.

With regard to subsection 6, Rule 60(b) mandates: "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) *not more than one year* after the judgment, order or proceeding was entered or taken." (Emphasis added).

"[R]elief under rule 60(b)(6) is only appropriate when justified by some reason other than those set forth in rule 60(b)(1)-(5)." *Id.* at 407 (citing *Bromfield v. Commonwealth*, 400 Mass. 254, 256 (1987); "In other words, to prevail under rule 60(b)(6), a party must show that there is a reason to justify the relief, *and also that the reason is not within the grounds set forth in rule 60(b)(1)-(5).*"

Where a litigant moves for relief from judgment due to newly discovered evidence of fraud during the proceedings, the motion "clearly fall[s] within subsections (2) and (3) of rule 60(b)" and is, accordingly, not actionable under Rule 60(b)(6). *Sahin v. Sahin*, 435 Mass. 396, 406 (2001). Because motions for relief from judgment on the basis of newly discovered evidence of a fraud during the proceeding "are not requests for relief independent of subsections (b)(1)-(5)", they are plainly subject to the one-year time restriction applicable to Rule 60(b)(1-3). *Id. See also Honer v. Wisniewski*, 48 Mass. App. Ct. 291, 295 (1999) ("Rule 60(b)(6) cannot be used to extend the one-year limitation applicable to rule 60(b)(1) or (b)(3).") (collecting authority); *In re Paternity of Cheryl*, 434 Mass. 23, 35 (2001). The

Supreme Judicial Court's application of this rule in *Sahin* demonstrates amply that the one-year limitation runs *from the date of the entry of judgment complained of, and not from the date of discovery of the fraud or new evidence. See id.* (denying 60(b) relief to spouse who discovered evidence of husband's fraud during course of divorce proceedings more than one year after the entry of judgment). *United States v. Pungitore*, a case decided by the U.S. District Court sitting in the Eastern District of Pennsylvania, is directly on point. There, a litigant moved, five years following the denial of his petition for habeas relief, for relief from judgment under Fed.R.Civ.P. 60(b)(6) on the ground that he had only recently discovered evidence that the judge who presided over his trial was biased. *See United States v. Pungitore*, 2003 WL 22657087 * 6 (E.D.Pa. Oct 24, 2003).

The defendants' contention in the present case, that they have only recently discovered evidence of Judge Lopez' bias, some three and four years after entry of the respective judgments, is a claim which is properly brought pursuant to subsection 2 of Rule 60(b) and is accordingly subject to its one year time limit.

B. The Relief Sought By Defendants Falls Under Subsections 1-3 Of Rule 60(b) And Is Subject To A One-Year Time Limitation.

The defendants do not dispute that the relief which they seek falls under clauses 1-3 of Rule 60(b). Defendants acknowledge on page 26 of their brief that the facts upon which they seek relief from judgment fall squarely within the grounds specified by subsections 1-3 of Rule 60(b). Defendants' Brief at p. 26. Specifically, defendants state:

> Several grounds specified in Rule 60(b) apply to the facts in this case – 60(b)(1), surprise; 60(b)(2), newly discovered evidence which by due diligence could not have been discovered; 60(b)(3), fraud; and 60(b)(6), any other reason justifying relief from the operation of the judgment.

Id. at 26-27. Defendants acknowledgement that the alleged facts upon which they seek 60(b) relief, namely the newly discovered evidence of Judge Lopez' supposed bias against them, falls within the scope of subparagraphs one, two, and three of Rule 60(b), subjects their request for relief to the one-year limitation period. *See, e.g., Sahin*, 435 Mass. at 406. As noted above, the judgments from which defendants seek relief date back to 1999 and 2000, respectively, and lie far beyond the one-year time limitation imposed by Rule 60(b). Therefore, by operation of Rule, defendants' motion for relief from judgment was untimely and was appropriately denied by Judge Brady.

* * *

III. DEFENDANTS' MOTION FOR RECUSAL, AND AN EVIDENTIARY HEARING HAS ALREADY BEEN DECIDED AND AFFIRMED AND THE DECISION IS NOW THE LAW OF THE CASE

The defendants bring to this appeal nothing new, it being merely a reprise of stale allegations that have already been considered by the trial court and which have been rejected by the SJC in previous appeals. The defendants contend that what is new is the revelation in the SJC hearing that Judge Lopez believed that the defendants were hostile to her and hence were her enemies. When the SJC considered the defendants appeal in *Demoulas IV*, which featured the Paul Walsh ruse as the

centerpiece of the motion to recuse, they were made aware that the defendants were so determined to attack the results of the previous cases that they would create a cruel and elaborate hoax in an attempt to gain damaging evidence to use against her. However this hostility may be characterized, the SJC was aware of it and nonetheless remanded the case back to Judge Lopez.

The defendants' entire argument is essentially premised on one isolated word, "enemies". It is the single thread they pull upon hoping, long after the fact, to unravel thirteen years of litigation resulting in affirmed adverse judgments against them. In the JCC hearings her use of the word "enemies" was qualified and guarded:

> Q. So is it your feeling Judge that you have enemies out there not just from the Demoulas case but others who may have filed fictitious complaints
>
> A. I wouldn't say enemies, but people who may not be happy with certain decisions I have made. But the Demoulas case is certainly the biggest I have dealt with.

A. 900.

Later in Mr. Ware's examination of Judge Lopez she reminds Mr. Ware that "enemies" is a "word you like to use." A. 903.

The recognition of the fact you have an enemy is, of course, not the same as being an enemy and for a judge an awareness that litigants have attacked you personally to overturn adverse decisions cannot, as the defendants insist, "compel" a conclusion of bias. *Defendants' Brief* at 4. *In re WHET*, 33 B.R. 424, 436-37 (d. Mass. 1983); *United*

States v. Grismore 564 F.2d 972 (10th Cir 1977). The SJC has at least implicitly recognized as much in three previous motions to recuse Judge Lopez.

The Court in *Demoulas IV* noted that the first recusal motion was filed in 1994 before the commencement of the derivative action and after the judge had presided over the jury trial in the stock transfer case. It was based upon the fact that the judge had to be biased because she had heard the evidence in the stock transfer case and many of the same witnesses would appear in the derivative case. On appeal the SJC ruled that, if there were any bias, it was judicial bias and not a basis for recusal and thus affirmed the trial court decision. *Demoulas I* at 524.

In *Demoulas IV*, 432 Mass. 43, despite the defendant's urging that the Court consider the affidavits arising out of the disgraceful and hapless ruse involving Judge Lopez' clerk and likewise consider the cumulative affect of their previous unsuccessful recusal motions, the Court ruled:

> We decline to revisit the allegations that supported the first and second motions to recuse. The issues relative to those allegations have previously been considered and they have been decided adversely to the defendants at both the trial and appellate level.

Id. (citing *see, Demoulas III* supra at 557 n.4; *Demoulas II*, supra at 524-526; *Demoulas I*, supra at 524-526).

With regard to the motions considered in *Demoulas IV* the Court affirmed their denial, noting once again that the motions were untimely without excuse or justification and that the affidavits supporting them were legally insufficient. *Demoulas IV* at 54.

Finally, the Court ruled that the defendant children's claim that Judge Lopez was in fact "adverse" to Arthur T. because he had filed complaint against the judge with the JCC was completely unsupported. There was no showing that the complaint caused the judge to be biased or prejudiced against him. *Demoulas IV* at 55.

In *Demoulas IV*, then the SJC considered the whole array of charges brought by the defendants and found them all to be baseless, lacking any evidence that Judge Lopez was adverse to or was harboring any ill will against the defendants. However, neither Judge Lopez nor the SJC could have been mindless that the repeated attacks upon the integrity of the judge made the defendants adverse to her decisions and that, given the Paul Walsh affair they would not scruple to employ trickery and deceit to overturn them. Thus, it could not have been lost on the SJC that the defendants were acting in a way that gave the clear impression that they were "enemies" of the court and the decision it had rendered "in accordance with our laws, fairly decided." A at 905. The fact that the Demoulas defendants were Judge Lopez' enemies and that she was aware that that they were, could not have been a surprise to anyone, even remotely involved in these cases. When the defendants lured the judge's clerk out of the country with the hope that they could trick him into damaging revelations, they clearly established their status as enemies of, not just Judge Lopez, but of the whole judicial process. After the defendants had the effrontery to move, for the third time, to recuse Judge Lopez based upon allegations arising out the deception practiced upon her clerk, their appeal of her refusal to the SJC brought the issue of their enmity glaringly before the Court. *Demoulas IV* at 46-55. The question of whether Judge Lopez was

biased against the defendants because they were hostile to her has been decided against the defendants and is now the law of the case. *King v. Globe Newspaper Co.*, 400 Mass. 705, 707 (1987).

* * *

APPENDIX G

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Department of the Trial Court

ARTHUR S. DEMOULAS, Plaintiff, vs. DEMOULAS SUPER MARKETS, INC. VALLEY PROPERTIES, INC., MARKET BASKET, INC. DORIC DEVELOPMENT CORPORATION, LEE DRUG, INC., and TELEMACHUS A. DEMOULAS, IRENE DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, and CAREN D. PASQUALE, Individually and As They Are General Partners of 231 Realty Associates, Defendants.	CIVIL ACTION NO. 90-2927(B)
RAFAELE LORAIN DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE DEMOULAS, ARTHUR S. DEMOULAS and EVANTHEA DEMOULAS, Plaintiffs, vs.	CIVIL ACTION NO. 90-2344(B)

TELEMACHUS DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, CAREN D. PASQUALE and DEMOULAS SUPER MARKETS, INC.,

Defendants.

EMERGENCY MOTION OF DEENDANTS [sic], TELEMACHUS A. DEMOULAS, IRENE DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM AND CAREN D. PASQUALE, FOR RELIEF FROM JUDGMENT PURSUANT TO MASS. R. CIV. P. 60(b) AND REQUEST FOR EVIDENTIARY HEARING

The defendants, Telemachus A. Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham and Caren D. Pasquale (hereinafter collectively referred to as the "Demoulas defendants"), hereby seek relief from the judgments entered in these actions based upon the trial court's violation of Canon 3(C) of the Code of Judicial Conduct, which provides that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where (a) he has a personal bias or prejudice concerning a party . . . " S.J.C. Rule 3:09, Canon 3(C)(1). Judge Lopez's recent testimony before the Judicial Conduct Commission establishes that she has been harboring a personal bias or prejudice against the Demoulas defendants (whom she described as her "enemies") since at least either November 1996 or June 1997 and most likely as early as 1994. However, in response to the Demoulas defendants previous motions to recuse, this judge represented that she was not biased or prejudiced

against the Demoulas defendants and refused to recuse herself. The Demoulas defendants were thereby deprived of their Constitutional right to a "fair trial in a fair tribunal." *In re Murchison,* 349 U.S. 133, 136 (1955). As "the impartial functions of the Court have been directly corrupted," *In re Tri-Cran, Inc.,* 98 B.R. 609, 615-616 (D. Mass. 1989), a fraud on the court has occurred.

For reasons more fully set forth in the memorandum submitted herewith, the Demoulas defendants respectfully request that, pursuant to Mass. R. Civ. P. 60(b), the Court restore the integrity of the judicial process in this case by (1) removing Judge Lopez as the presiding officer; (2) vacating all decisions entered by Judge Lopez after at least June 1997; (3) ordering a hearing to determine when Judge Lopez's partiality, within the meaning of Canon 3(C), first arose; and (4) granting appropriate relief for events occurring before June 1997, once the record of the judge's misconduct has been fully established.

ARTHUR T. DEMOULAS,
GLORIANNE D. FARNUM [sic] and
CAREN D. PASQUALE,
By their attorney,

/s/ Rudolph F. Pierce
Rudolph F. Pierce, BBO# 399380
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TELEMACHUS A. DEMOULAS and
IRENE DEMOULAS,
By their attorney,

/s/ Andrea S. Barisano/mm
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FRANCES D. KETTENBACH,
By her attorney,

/s/ Robert L. Kirby/mm
Robert L. Kirby, Jr., BBO#550538
Nixon Peabody LLP
101 Federal Street
Boston, MA 02110
(617) 345-1000

Dated: April 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail (by hand) on 4-9-03

/s/ Rudolph F. Pierce

APPENDIX H

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. Superior Court
Department of the Trial Court

ARTHUR S. DEMOULAS, Plaintiff, vs. DEMOULAS SUPER MARKETS, INC. VALLEY PROPERTIES, INC., MARKET BASKET, INC. DORIC DEVELOPMENT CORPORATION, LEE DRUG, INC., and TELEMACHUS A. DEMOULAS, IRENE DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, and CAREN D. PASQUALE, Individually and As They Are General Partners of 231 Realty Associates, Defendants.	CIVIL ACTION NO. 90-2927(B)

RAFAELE LORAIN DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, DIANA D. MERRIAM, FOTENE DEMOULAS, ARTHUR S. DEMOULAS and EVANTHEA DEMOULAS, Plaintiffs, vs.	CIVIL ACTION NO. 90-2344(B)

TELEMACHUS DEMOULAS, ARTHUR T. DEMOULAS, FRANCES D. KETTENBACH, GLORIANNE D. FARNHAM, CAREN D. PASQUALE and DEMOULAS SUPER MARKETS, INC.,

Defendants.

MEMORANDUM IN SUPPORT OF THE DEFENDANTS' EMERGENCY MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60(b)(6) AND REQUEST FOR EVIDENTIARY HEARING

* * *

Here, the judge's own testimony and conduct demonstrate a consuming bias which casts significant doubt on her ability to rule impartially in these cases. It, therefore, cannot be reasonably disputed that the judge's bias is the sort of extreme, deep-seated and pervasive bias which the Supreme Court held required recusal in *Liteky v. U.S.*, 510 U.S. 540, 551 (1994).

* * *

Although the judge's ability to render fair and impartial decisions in these cases was corrupted by her bias, she nonetheless refused to recuse herself and, as a result, deprived the Demoulas defendants – her "enemies" – of their Federal and state Constitutional right to have the remaining matters in these cases decided by an impartial judge. "The fundamental law of the Commonwealth is that '[i]t is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.'" *King v. Grace,* 293 Mass. 244, 246 (1936), *quoting* Art. 29 of the Declaration of Rights of the Constitution.

See MacDonald, supra, 407 Mass. at 203 ("[T]he right to an impartial decision-maker is required by due process' "), *quoting Arnett v. Kennedy,* 416 U.S. 134, 197, 94 S.Ct. 1633, 1665 (1974) (White, J., concurring in part and dissenting in part), and *citing Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022 (1970) (an impartial decision maker is essential). *Cf. Walberg v. Israel,* 766 F.2d 1071, 1077 (7th Cir. 1985) ("the judge who is so hostile to a lawyer as to doom the client to defeat deprives the client of the right to an impartial tribunal").

* * *

Justice requires "'[a] fair trial in a fair tribunal.'" *Craven v. State Ethics Com'n,* 390 Mass. 191, 197 (1983) (quoting *In re Murchison,* 349 U.S. 133, 136 (1955)). "It is well-settled that the Due Process Clause [of the Fourteenth Amendment] prevents the state from depriving a plaintiff of a protected property interest without 'a fair trial in a fair tribunal.'" *Stivers v. Pierce,* 71 F.3d 732, 741 (9th Cir. 1995). "'*Fairness of course requires an absence of actual bias* in the trial of cases.'" *Commonwealth v. Howard,* 367 Mass. 569, 572 (1975) (emphasis added) (quoting *In re Murchison, supra,* 349 U.S. at 136). A party may establish that "he has been denied his constitutional right to a fair hearing before an impartial tribunal . . . [where] the proceedings and surrounding circumstances . . . demonstrate *actual* bias on the part of the adjudicator." *Stivers v. Pierce,* 71 F.3d at 741.[21] By harboring a bias

[21] The judge's conduct denied the defendants rights guaranteed by the Due Process Clause and, therefore, the Demoulas defendants raise this federal issue in order to ensure that whatever rights they have are properly preserved. *Cf. Roy v. City of Augusta,* 712 F.2d 1517 (1st Cir. 1983) ("Where a party should reasonably foresee that an adverse state

(Continued on following page)

against the defendants strong enough to consider them her "enemies" and to feel "persecuted" by them, the judge has robbed the defendants, at least since 1997 (and most likely as early as 1994), of their right to a fair administration of their cases by an impartial court. *See Margoles v. Johns,* 660 F.2d 291, 296 (7th Cir. 1981) ("A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him").

* * *

VII. CONCLUSION

"Courts should not forfeit truth for the sake of finality." *Leber-Krebs, Inc. v. Capitol Records,* 779 F.2d at 901. Accordingly, the defendants respectfully request that, pursuant to Mass. R. Civ. P. 60(b), the Court restore the integrity of the judicial process in this case by (1) removing Judge Lopez as the presiding officer; (2) vacating all decisions entered by Judge Lopez after June 1997; (3) ordering a hearing to determine when it could reasonably be said that Judge Lopez's partiality, within the meaning of Canon 3(C), began; and (4) granting appropriate relief for events occurring before June 1997, once the record of the judge's misconduct has been fully established.

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court judgment will create a constitutional issue, that issue should be argued before the state court").

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Dated: April 9, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon the attorney of record for each party by mail (by hand) on 4-9-03

/s/ Rudolph F. Pierce

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NOS. 2003-P-1255 and 2003-P-1256 (Consolidated)

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, *et al.*,
Plaintiffs-Appellees

v.

TELEMACHUS A. DEMOULAS, *et al.*,
Defendants-Appellants.

ARTHUR E. DEMOULAS
Plaintiff-Appellee

v.

DEMOULAS SUPER MARKETS, INC., *et al.*
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF MIDDLESEX COUNTY
(BRADY, J.)

Brief of the Defendants-Appellants Telemachus Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham and Caren D. Pasquale

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* * *

Dated: December 10, 2003

ARGUMENT

I. OVERVIEW

Fundamental to the American system of justice is the notion of "fairness." A key element of that notion is the "impartiality" of the judge or arbiter of the judicial or administrative proceeding. "The right to trial by an impartial judge 'is a basic requirement of due process'." *See U.S. v. Haines*, 975 F2d 81, 98 (3rd Cir. 1992), quoting *In re Murchison*, 349 U.S. 133, 136 (1955). Indeed, art. 29 of the Massachusetts Declaration of Rights explicitly states judges are to be "as 'free, impartial, and independent as the lot of humanity will admit'." *See Parenteau v. Jacobson*, 32 Mass. App. Ct. 97, 99 (1992). This concept of "impartiality" is codified in Canon 3 of the Rules of the Supreme Judicial Court entitled "A Judge Should Perform the Duties of His Office Impartially and Diligently."

* * *

III. THE TRIAL COURT'S REFUSAL TO GRANT DEFENDANTS ANY FORM OF RELIEF, DESPITE JUDGE LOPEZ'S EXTRAORDINARY ADMISSION OF HER HOSTILITY TOWARD THEM, WAS AN ABUSE OF DISCRETION

A. Due Process and the Impartiality of the Trial Judge

The right to due process of law, guaranteed by our state and federal constitutions, requires that court proceedings be presided over by a fair and impartial decision-maker. *See, e.g., Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (applying the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution); *King v. Grace*, 293 Mass. 244, 246 (1936) (applying Article 29 of the Declaration of Rights of the Massachusetts Constitution).[13] In implementing this requirement, the Supreme Judicial Court has made clear that a judge may not preside over a case when, under an objective appraisal of the facts, her impartiality might reasonably be called into question. S.J.C. Rule 3:09; Mass. Code of Judicial Conduct, Canon 3(C)(1), *see Demoulas*, 428 Mass. at 545 n.6; *Haddad v. Gonzalez*, 410 Mass. 855, 862 (1991); accord *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 848 (1988). Thus, even when a judge subjectively believes

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[13] See *also MacDonald v. MacDonald*, 407 Mass. 196, 203 (1990) (" 'the right to an impartial decision-maker is required by due process' ") (quoting *Arnett v. Kennedy*, 416 U.S. 134, 197 (1974) (White, J. concurring in part and dissenting in part)); *King*, 293 Mass. at 246 (holding that "[t]he fundamental law of the Commonwealth is that it is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit"); cf. *Stivers v. Pierce*, 71 F.3d 732, 741 (9th Cir. 1995) (holding that the Due Process Clause of the Fourteenth Amendment "prevents the state from depriving a plaintiff of a protected property interest without 'a fair trial in a fair tribunal' ").

in her own freedom from bias, recusal is required when the circumstances would lead an objective observer to question the accuracy of her belief. *Parenteau, supra,* 32 Mass. App. Ct. at pp. 102-04 (1992); accord *Cameron v. Cameron*, 444 A.2d 915, 919 (Conn. Super. Ct. 1982) (observing that "[p]roof of actual bias is not required for disqualification" because "[t]he appearance as well as the actuality of impartiality on the part of the trier is an essential ingredient of a fair trial," and holding that recusal was required where "[t]he record . . . disclose[d] a situation 'which inevitably raises in the minds of litigants . . . a suspicion as to the fairness of the court's administration of justice'") (quoting *Krattenstein v. G. Fox* & Co., 236 A.2d 466, 469 (Conn. 1967)).

The need for an objective as well as subjective determination of the judge's impartiality is grounded not only in the litigants' constitutional right to due process, but also in the public's right to judicial system in which it can have confidence. *See, e.g., In re Antar*, 71 F.3d 97, 101 (3d Cir. 1995); *United States v. Bosch*, 951 F.2d 1546, 1557 (9th Cir. 1991). Whatever the judge's actual feelings may be, when the circumstances are such that an objective, knowledgeable member of the public can reasonably question the judge's impartiality, public confidence in the judicial system – upon which the viability of that system depends – is threatened. *See Liljeberg,* 486 U.S. at 848; *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3d Cir. 1993). Thus, as the Supreme Court observed in *Marshall,* providing litigants with both the "appearance and [the] reality of fairness" is of crucial importance to our system of justice. 446 U.S. at 242; *See also Offutt v. United States,* 348 U.S. 11, 14 (1954) (observing that "justice must satisfy the appearance of justice").

* * *

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APPENDIX J

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
NOS. 2003-P-1255 and 2003-P-1256 (Consolidated)

RAFAELE LORAINE DEMOULAS, ADMINISTRATRIX OF THE ESTATE OF EVAN G. DEMOULAS and NEXT FRIEND OF VANESSA EVAN DEMOULAS, et al.,
Plaintiffs-Appellees

v.

TELEMACHUS A. DEMOULAS, et al.,
Defendants-Appellants.

ARTHUR S. DEMOULAS
Plaintiff-Appellee

v.

DEMOULAS SUPER MARKETS, INC., et al.
Defendants-Appellants.

ON APPEAL FROM AN ORDER OF THE
SUPERIOR COURT OF MIDDLESEX COUNTY
(BRADY, J.)

Reply Brief of the Defendants-Appellants Telemachus Demoulas, Irene Demoulas, Arthur T. Demoulas, Frances D. Kettenbach, Glorianne D. Farnham and Caren D. Pasquale

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* * *

Stripped to its essence, due process means, among other things, that a litigant should not have to bear the weight of suspicion as to whether the judge before whom he appears is fair and impartial. *Cf. Cameron v. Cameron*, 444 A.2d 915, 919 (Conn. Super Ct. 1982). The United States Supreme Court made this point plain in *Marshall* v. *Jerrico* 446 U.S. 238, 242 (1980), when it said that "the neutrality requirement helps to guarantee that life, liberty or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and the reality of fairness. . . ." Accordingly, whenever it becomes clear or the judge reveals that she can no longer be fair and impartial, the law requires recusal.

Additionally, the courts are particularly sensitive to this requirement when the judge, as here, is trying the

cause without a jury. "[W]hen the judge is the actual trier of fact, the need to preserve the appearance of impartiality is especially pronounced." *Alexander* v. *Primerica Holdings, Inc.* 10 F.2d [sic] 155, 166 (3rd Cir. 1993).

* * *

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APPENDIX K

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

No. _____

MIDDLESEX, SS.

APPEALS COURT
NO. 03-P-1255

RAFAELE L. DEMOULAS,
administratrix, & others,
Plaintiff-Appellees

v.

TELEMACHUS A. DEMOULAS & others,
Defendants-Appellants

(and a companion case)

REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

The defendant-appellant Frances D. Kettenbach respectfully requests pursuant to Mass. R. App. P 27.1, as amended through 434 Mass. 1601 (2001), that this Honorable Court grant her leave to obtain further appellate review of the above-captioned case following the rescript of the Appeals Court dated October 26, 2004. *Demoulas* v. *Demoulas,* 62 Mass. App. Ct. 1107 (2004). In support of this request, the applicant, a daughter of Telemachus Demoulas, states that substantial reasons affecting the public interest and the interests of justice mandate further appellate review of the issues raised on appeal. This appeal challenges the constitutionality of the entire

Massachusetts jurisprudence governing recusal of judges. It requires decision by the Commonwealth's highest court.

* * *

STATEMENT OF THE POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW OF THE DECISION OF THE APPEALS COURT IS SOUGHT

* * *

(c) Massachusetts recusal jurisprudence is unconstitutional because it protects a biased, or even a corrupt, judge, rather than protecting the rights secured to a litigant by the Massachusetts Declaration of Rights, arts. 11 and 29, and by the United States Constitution, amend. 14, § 1.

ARGUMENT

* * *

C. THE TWO-PRONG TEST FOR DISQUALIFICATION OF A JUDGE, APPLIED IN EARLIER DECISIONS OF THIS COURT, IS UNCONSTITUTIONAL BECAUSE IT ABRIDGES RIGHTS SECURED TO A LITIGANT BY BOTH THE UNITED STATES CONSTITUTION AND THE CONSTITUTION OF THE COMMONWEALTH

This appeal has relatively little to do with Judge Lopez and the other personalities in these protracted cases. It has everything to do with the State and Federal Constitutions. The facts compellingly illustrate the need for the Commonwealth's highest Court to examine the constitutional validity of the recusal procedure articulated

in *Lena* v. *Commonwealth,* 369 Mass. 571, 575 (1976), and *Haddad* v. *Gonzalez,* 410 Mass. 855, 862 (1991). In *Lena, ibid.,* Justice Kaplan, writing for the Court, stated:

> "Faced, then, with a question of his capacity to rule fairly, the judge was to consult first his own emotions and conscience. If he passed the internal test of freedom from disabling prejudice, he must next attempt an objective appraisal of whether this was 'a proceeding in which his impartiality might reasonably be questioned.' S.J.C. Rule 3:25 Canon 3(C)(1)(a) [382 Mass. 811 (1980)]."[1]

Such determinations are reviewed under the deferential "abuse of discretion" standard. *Demoulas II,* 428 Mass. at 546.

This case raises the fundamental question of the role of appellate courts in protecting the constitutional rights of a litigant in the Commonwealth to have his case heard "by judges as free, impartial and independent as the lot of humanity will admit," Massachusetts Declaration of Rights, art. 29, to the end that he "find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character," *id.,* art. 11. "These constitutional guarantees have been rigidly enforced." *King* v. *Grace,* 293 Mass. 244, 246 (1936). Federal guarantees are also implicated. The right of litigants to a fair trial by a fair tribunal in State courts

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[1] "(C) Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has personal bias or prejudice concerning a party. . . . "

is secured by the due process guarantee of the Fourteenth Amendment to the United States Constitution. *Stivers* v. *Pierce,* 71 F.3d 732, 741 (9th Cir. 1995). *Ward* v. *Monroeville,* 407 U.S. 57 (1972). In economic matters, this Court recognizes "little difference" between State and Federal due process standards. *Klein* v. *Catalano,* 386 Mass. 701, 707 n. 6 (1982). The recusal procedure established by this Court in the *Lena* and *Haddad* decisions does not meet these stern constitutional tests.

While our system of justice has historically granted trial judges broad discretion in determining whether their recusal is required by actual bias or the appearance of bias, that exercise of discretion is subject to appellate review. Such review, however, is meaningful only if there is an adequate record in the trial court as well as a full and fair opportunity to develop such a record. This is the essence of the constitutional guarantees at issue in the present case. This Court has stated that, for evidence of bias to be sufficient,

> "the affidavits must set forth facts, including the time, place, persons, and circumstances, and, where based on an extra-judicial statement of the judge, the substance of that statement."

Demoulas IV, 432 Mass. at 53. The time, place, persons, and circumstances are now embodied in Judge Lopez's sworn testimony, see pp. 4-5, *supra,* which unmistakably demonstrates paranoia, bias, and partiality. Due process principles require that the defendants be afforded a hearing to determine the extent of her bias, how and when it developed.

Judge Lopez denied the defendants their basic due process right to call and examine witnesses on the factual

questions critical to the issue of recusal. Both this Court and the Appeals Court nevertheless affirmed the denial of recusal motions in reliance upon Judge Lopez's statements that she had examined her conscience and could decide the case impartially. See *Demoulas II,* 428 Mass. at 545; Appeals Court order, *infra,* p. 20. As the facts developed in the CJC proceedings demonstrate, however, Judge Lopez's statements may well have been incomplete, inaccurate, and false when made.

The integrity of our system of justice and the public's perception of its integrity require fair and impartial judges. *Matter of Brown,* 427 Mass. 146, 149 (1998) ("Surely it is arrogance to say . . . that we may not seem impartial, but we know we are"). In this case, that integrity as well as the appearance of integrity can only be assured by a full and fair hearing where the questions surrounding Judge Lopez's bias are fully explored. Unfortunately, such a hearing was denied, initially by Judge Lopez and later by the motion judge. The motion judge's ruling followed new disclosures by Judge Lopez herself concerning her bias. These new disclosures, displaying enmity and paranoia, raised disturbing questions about judicial bias and the appearance of bias.

Self-analysis by a manifestly biased judge is impossible. Simply to trust the integrity of the trial judge rests on an assumption fundamentally flawed, if the judge is already partial. The decision of such a judge, who simply recites the formula of *Lena* and *Haddad,* can rise no higher than its source. Current Massachusetts recusal jurisprudence protects the judge who chooses bias but is

willing to make this recitation.[2] Even a corrupt judge would be protected. The present case presents the paradigm example, happily rare, of a judge who did not possess the qualities expected by this Court. See *e.g.*, *Matter of DeSaulnier,* 360 Mass. 757 (1971); *Matter of Troy,* 364 Mass. 15 (1973); *Matter of Bonin,* 375 Mass. 680 (1978). The need for an objective as well as a subjective determination of a judge's impartiality is grounded not only in the litigants' constitutional right to due process, but also in the public's right to a judicial system in which it can have confidence. There is now sufficient evidence of Judge Lopez's bias to require a hearing, to determine, by a preponderance of the evidence, whether her bias and partiality affected the outcome of this case.

No previous appellate consideration of this case has appraised the constitutionality of the recusal test.[3] It is essential to the public's continued confidence in the judiciary that this Court reexamine the recusal procedure in light of its constitutional dimension. Furthermore, from the CJC proceedings against Judge Lopez, there is now sufficient new evidence to require a hearing to determine whether bias and partiality pervaded her decisions.

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[2] Moreover, for any person to be the judge in his own cause is contrary to one of the oldest usages of the common law. *Bonham's Case,* 8 Co. Rep. 114a, 77 Eng. Rep. 647 (C.P. 1610).

[3] It would not have been the function of the Appeals Court to alter an established rule of law. *Burke* v. *Toothaker,* 1 Mass. App. Ct. 234, 239 (1973).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court accept this matter for further appellate review.

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